

# One Minute Memo<sup>®</sup>



## Supreme Court Comcast Antitrust Opinion Will Have Major Impact on Class Actions

This past week, in the case of *Comcast Corp. v. Behrend*, Case No. 11-864, the Supreme Court rejected a proposed antitrust class action against Comcast Corporation (“Comcast”), in which more than two million current and former Comcast subscribers alleged the company had violated antitrust law through its attempts to reduce competition and overcharge customers. The court’s decision could impact the ways in which plaintiffs satisfy class action requirements.

This decision requires plaintiffs to show a method by which class-wide damages can be commonly calculated in a class action lawsuit. Under this ruling, plaintiffs’ experts must calculate class-wide damages for each theory of recovery in order to ensure a viable class action. The case is likely to impact class certification especially in cases where simplified modeling of damages is done, such as consumer protection, employment, and antitrust class actions. Furthermore, such a ruling is likely to make certifying a class action more difficult than in the past.

### THE SUPREME COURT HOLDING

In a 5-4 opinion, the Court held that the class action was improperly certified under Rule 23(b)(3). The Rule “does not set forth a mere pleading standard.” *Ibid.* Rather, a party must not only “be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact,” typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a). The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b). The provision at issue here is Rule 23(b)(3), which requires a court to find that “the questions of law or fact common to class members predominate over any questions affecting only individual members.” *According* to the majority opinion, written by Justice Scalia, “by refusing to entertain arguments” regarding the damages models presented, “simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry.” Instead, it “may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.” An analysis of this type “will frequently overlap with the merits of the plaintiff’s underlying claim.”

### THE ANTITRUST CLAIM

According to the Plaintiffs, Comcast had engaged in a strategy known as clustering, where cable television operations are clustered in a particular region. Comcast acquired competitor providers and swapped their own systems outside a particular region for competitor systems in the region. By 2007, Comcast’s dominance of the Philadelphia Designated Market Area (“DMA”), which includes sixteen counties in Delaware, Pennsylvania, and New Jersey, had increased substantially, reaching 69% from only 24% in 1998. Based on the company’s increased market share, customers in the Philadelphia DMA filed a class action suit in federal district court, alleging that Comcast had violated § 1 and § 2 of the Sherman Act through unlawful swapping agreements and attempted monopolization.

### THE DISTRICT COURT OPINION

At the initial class certification stage, the District Court held, and it was uncontested at the Supreme Court, that to meet the predominance requirement respondents had to show (1) that the existence of individual injury resulting from the alleged antitrust violation (referred to as “antitrust impact”) was “capable of proof at trial through evidence that [was] common to the class rather than individual to its members”; and (2) that the damages resulting from that injury were measurable

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“on a class-wide basis” through use of a “common methodology.” 264 F. R. D., at 154. The plaintiffs presented four distinct theories of antitrust impact. First, Plaintiffs alleged Comcast reduced the benchmark levels of competition in the Philadelphia DMA. Second, Comcast’s activities allegedly reduced the level of competition from overbuilders, companies which build competing networks in areas where an incumbent cable company already operates. Third, the clustering technique allegedly decreased market penetration by satellite providers, as it made it profitable for Comcast to withhold local sports programming from its competitors. Finally, the Plaintiffs alleged Comcast’s clustering technique increased Comcast’s bargaining power relative to content providers.

Although the District Court only accepted one of the Plaintiffs’ theories of antitrust impact, namely that Comcast’s activities reduced the level of competition from overbuilders, the Court found that Plaintiffs could still prevail under Rule 23(b)(3), and certified the class under this theory. Furthermore, the Court found that damages resulting from such deterrence could still be calculated on a class-wide basis, even though the Plaintiffs’ expert had calculated overall damages based on the combination of all four theories of impact, not just the overbuilder theory.

### THE THIRD CIRCUIT DECISION

Comcast appealed to the Third Circuit, arguing that Plaintiffs’ alleged damages were based on all four theories of antitrust impact, and thus, did not adequately measure the harm attributable only to the overbuilder theory. According to Comcast, since it was not clear which Plaintiffs’ damages were based on which theory, the Plaintiffs could not satisfy the commonality required under Rule 23(b). On appeal, however, a divided Third Circuit Court of Appeals *affirmed* the trial court’s certification, finding “an attack on the merits of the methodology had no place in the class certification inquiry,” and Plaintiffs merely had to show they were able to prove damages of some sort.

### THE SUPREME COURT APPLIES ITS HOLDING TO THE FACTS

Here, “in light of the [damages] model’s inability to bridge the differences between supra-competitive prices in general and supracompetitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class. The Court reasoned that it was not clear whether every Plaintiff was necessarily damaged by each of the four alleged theories of antitrust impact, and it was distinctly possible that some Plaintiffs in the Philadelphia DMA were damaged by one type of conduct, while others were injured by another. As such, the majority held that the damages model the customers presented failed to show that individual damages calculations would not overwhelm questions common to the class. For the customers to prevail, they would have had to measure damages attributable only to the overbuilder theory of competition. In this case, it was not clear whose damages resulted from which type of antitrust impact, leading to uncertainty about whether damages could be measured class wide, rather than on an individual basis.” *According to the majority*, adopting the appellate court’s position would render any method of measurement acceptable, “no matter how arbitrary” and would reduce Rule 23(b)(3)’s predominance requirement to a nullity.

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